

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
OCTOBER SESSION, 1996**

<b>IVORY BROWN,</b>	)	
	)	No. 02C01-9505-CC-00137
Appellant	)	
	)	HAYWOOD COUNTY
vs.	)	
	)	Hon. Dick Jerman, Jr., Judge
<b>STATE OF TENNESSEE,</b>	)	
	)	(Post-Conviction)
Appellee	)	

For the Appellant:

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District Public Defender

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For the Appellee:

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OPINION FILED: \_\_\_\_\_

AFFIRMED

**David G. Hayes**  
Judge

## OPINION

The appellant, Ivory Brown, appeals the Haywood County Circuit Court's order denying his petition for post-conviction relief. In this appeal, the appellant contends that he was denied his constitutional right to the effective assistance of counsel.<sup>1</sup> In his brief, the appellant alleges that his trial counsel was ineffective based upon counsel's:

- (A) failure to apprise the appellant of the charges against him;
- (B) failure to contact "three to four" witnesses named by the appellant;
- (C) failure to request a special jury instruction on missing witnesses; and
- (D) failure to adequately prepare for trial.

After a review of the record and the brief of both parties, we affirm the order of the trial court denying post-conviction relief.

### **I. Background**

On September 15, 1992, a jury returned a verdict finding the appellant guilty of the offenses of conspiracy to commit murder in the first degree and two

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<sup>1</sup>The appellant raises only one issue on appeal, whether the evidence preponderates against the trial court's finding that the appellant was not denied effective assistance of counsel. This issue is waived because it does not conform to Rule 27(a)(4), Tenn. R. App. P. Harvey v. State, 749 S.W.2d 478, 479 (Tenn. Crim. App. 1987), perm. to appeal denied, (Tenn. 1988); accord Tortorich v. Erickson, 675 S.W.2d 190, 191 (Tenn. App.), perm. to appeal denied, (Tenn.1984); State v. Lewis, No. 2 (Tenn. Crim. App. at Jackson, Dec. 23, 1987), perm. to appeal denied, (Tenn. 1988) (Jones, J., concurring); see also Tenn. R. App. P. 27(a)(6-7). "T.R.A.P. does not contemplate that an appellant may submit one blanket issue as to the correctness of a judgment and thereby open the door to argument upon various issues which might affect the correctness of the judgment." Lewis, No. 2 (quoting Leeson v. Chernau, 734 S.W.2d 634, 637 (Tenn. App.), cert. denied, (Tenn. 1987)). Therefore, as the appellant's issue of ineffectiveness is too general in scope under Tenn. R. App. P. 27(a)(4), we conclude that this issue has been waived. However, we elect to review the ineffectiveness claim as to the issues specifically articulated in his argument.

counts of reckless endangerment.<sup>2</sup> Subsequently, the trial court imposed concurrent sentences of twenty-two years and six months for the conspiracy conviction and two years for each reckless endangerment conviction. On appeal, this court affirmed the appellant's convictions but modified his sentence for conspiracy to twenty years. See State v. Brown, No. 02C01-9303-CC-00036 (Tenn. Crim. App. at Jackson, Dec. 1, 1993). On August 11, 1994, the appellant filed a petition for post-conviction relief alleging ineffective assistance of counsel. A hearing was held on March 6, 1995. On March 29, 1995, the trial court dismissed the petition.

At the post-conviction hearing, the appellant testified that John Bond, who is now deceased, represented him at his September 1992 trial. The appellant stated that Bond did not inform him of the pending charges. He further complained that Bond only discussed the charges with him "once before the trial," despite the appellant's attempts to arrange further meetings. He added that there were no arrangements "before the case to get our proper evidence and witnesses together." In fact, the appellant testified that he provided Bond with the names of "three to four" witnesses, but Bond never contacted these people.<sup>3</sup> The appellant also related his dissatisfaction with his trial counsel's failure to file various motions, failure to make timely and necessary objections, failure to move for an acquittal, and failure to ask for the missing witness rule concerning Anthony Rogers.

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<sup>2</sup>The appellant was initially charged with three counts of attempt to commit first degree murder, two counts of aggravated assault, two counts of reckless endangerment, and one count of conspiracy to commit first degree murder. The proof introduced at the appellant's trial revealed that, on August 16, 1991, the appellant and Otis Stocking drove by a party at the W.O.W. Building in Brownsville, Tennessee. They were advised that Anthony Rogers was looking for them. The two men then proceeded to the apartment of Stocking's sister, where they obtained two pistols and changed automobiles. Along with two other persons, the appellant and Stocking returned to the W.O.W. building. The appellant exited the vehicle and began walking toward a nearby football field. Stocking, who remained in the vehicle, spotted Anthony Rogers and began firing his weapon. Two innocent bystanders were injured as a result of this incident. The appellant later conceded his involvement in the incident. See State v. Brown, No. 02C01-9303-CC-00036 (Tenn. Crim. App. at Jackson, Dec. 1, 1993).

<sup>3</sup>On cross-examination, the appellant indicated that these witnesses consisted of his sister and his co-defendants.

On cross-examination, the appellant admitted that he was aware of the punishment for attempted murder and that the lesser offenses "didn't carry as much time." Specifically, his trial counsel had relayed the State's offer of fifteen years, the minimum sentence available for attempted murder, in exchange for a guilty plea. The appellant also conceded that he had informed trial counsel that he intended to proceed to trial.

Edward Hardister, the prosecutor at the appellant's trial, testified that, prior to trial, the appellant's trial counsel, Bond, contacted him several times to discuss the case. Hardister confirmed that the State was unable to serve Anthony Rogers, the intended victim, with a subpoena. This concluded the proof at the post-conviction hearing.

In denying the appellant's petition, the court found that his counsel adequately advised the appellant of the charges against him, that trial counsel communicated the State's offer of fifteen years to him, and that the appellant understood the time he could receive on the pending charges. The court noted that trial counsel properly and adequately investigated and prepared the defense for the appellant. Furthermore, trial counsel made all necessary objections in a timely manner. Accordingly, the court concluded that "the advice given and the services rendered [by John Bond] were within the range of competency demanded of attorneys in criminal cases. And that the defendant was not denied effective assistance of counsel. . . ."

## **II. Analysis**

Post-conviction relief is not a forum in which to relitigate claims of error raised and determined previously by a court of competent jurisdiction. Swanson

v. State, 749 S.W.2d 731, 833 (Tenn. 1988); State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987). Accordingly, we elect not to address the appellant's allegation of ineffectiveness due to failure to request a missing witness instruction as it has been previously determined by this court on direct appeal. See Brown, No. 02C01-9303-CC-00036. Thus, our review is limited to the allegations of deficient performance based upon trial counsel's failure to advise the appellant of the pending charges, failure to contact alleged "alibi" witnesses, and failure to adequately prepare for trial.

In determining whether the appellant received effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and Art. I, Sec. IX of the Tennessee Constitution, this court must look to whether the performance of trial counsel was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To reverse a conviction on these grounds, the appellant must show, by a preponderance of the evidence, Taylor v. State, 875 S.W.2d 684, 686 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), that counsel's representation was deficient and that there was prejudice resulting from that deficiency.<sup>4</sup> Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984).

Counsel's representation is deficient if the errors were so serious as to deprive the appellant of representation guaranteed by the Sixth Amendment. Cox v. State, 880 S.W.2d 713, 717 (Tenn. Crim. App. 1994). The deficient representation becomes prejudicial when said representation deprives the appellant of a fair trial with a reliable result. Id. However, this court's review may

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<sup>4</sup>The Strickland standard has been applied to the right of counsel under Article I, Section IX of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874, 110 S.Ct. 211 (1989).

first look at the prejudice prong of Strickland. If the court finds that the defendant suffered no prejudice, a deficiency, if any, is considered harmless. Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Therefore, even if there are attorney errors, the appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" in order to succeed on an ineffectiveness claim. Strickland, 466 U.S. at 693, 104 S.Ct. at 2068.

The appellant alleges that trial counsel failed to advise him of the charges against him, failed to call alibi witnesses, and failed to prepare for trial. At the post-conviction hearing, the appellant failed to produce any alibi witness. He is, therefore, unable to establish that he suffered prejudice by trial counsel's failure to call these witnesses at trial. Additionally, the appellant admitted that he was aware of the possible punishment for the charges before proceeding to trial. Also, he conceded that he was aware of the State's plea offer and that he discussed his case and strategy for trial with trial counsel. Moreover, Edward Hardister, the prosecutor at the appellant's trial, testified that he had several discussions with the appellant's trial counsel prior to trial and that counsel had access to all reports involving the appellant's case. Furthermore, the court recalled various pre-trial motions filed by trial counsel and that counsel's representation of the appellant was "more than adequate."

The burden rests with the appellant to prove his allegations by a preponderance of the evidence. Taylor, 875 S.W.2d at 686. The post-conviction court found that the appellant failed to carry his burden of proof. We agree. Additionally, we conclude that the appellant has failed to carry his burden of showing that either prong of the Strickland test has been met. Because the trial court's findings of fact are afforded the weight of a jury verdict, this court is

bound by those findings unless the evidence in the record preponderates against them. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The evidence in the record before us supports the findings of the trial court. Accordingly, we affirm the trial court's order denying the appellant post-conviction relief.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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PAUL G. SUMMERS, Judge